

1 UNITED STATES COURT OF APPEALS  
2  
3 FOR THE SECOND CIRCUIT  
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6  
7 August Term, 2005  
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9 (Argued: December 16, 2005

Decided: April 27, 2006)

10 Docket Nos. 04-6480-cv(L), 04-6498-cv(CON), 04-6499-cv(CON)  
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13  
14 JOSEPH LOCURTO, JONATHAN WALTERS, and ROBERT STEINER,  
15

16 *Plaintiffs-Appellees,*  
17

18 v.  
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20 RUDOLPH GIULIANI, Mayor of the City of New York, HOWARD SAFIR, Commissioner of  
21 the New York City Police Department, THE CITY OF NEW YORK, and THOMAS VON  
22 ESSEN, Commissioner of the New York City Fire Department,  
23

24 *Defendants-Appellants.*  
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28 Before: OAKES, CALABRESI, and WESLEY, *Circuit Judges.*  
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32 Defendants-Appellants appeal a judgment of the United States District Court for the  
33 Southern District of New York (Sprizzo, *J.*) in favor of Plaintiffs-Appellees on Plaintiffs-  
34 Appellees' claim that they had been dismissed from public employment by reason of their  
35 exercise of free speech, in violation of the First and Fourteenth Amendments. REVERSED and  
36 REMANDED.  
37

38  
39 CHRISTOPHER DUNN (Arthur Eisenberg, *of counsel*), New  
40 York Civil Liberties Union, New York, N.Y., *for* Plaintiff-  
41 Appellee Joseph Locurto.  
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43 Michael N. Block, Sullivan Papain Block McGrath & Cannavo,

1 P.C., New York, N.Y., *for* Plaintiff-Appellee Jonathan Walters.

2  
3 Robert Didio, Kew Gardens, N.Y., *for* Plaintiff-Appellee Robert  
4 Steiner.

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6 ELIZABETH I. FREEDMAN, Assistant Corporation Counsel  
7 (Francis F. Caputo, Jonathan Pines, and Michael A. Cardozo,  
8 Corporation Counsel of the City of New York, *of counsel*), New  
9 York, N.Y., *for* Defendants-Appellants.

10  
11 Mitchell A. Karlan (David L. Kerstein, Farrah L. Pepper, and  
12 Matthew S. Kahn, *of counsel*), Gibson Dunn & Crutcher LLP, New  
13 York, N.Y., *for Amici Curiae* The Lawyers' Committee for Civil  
14 Rights Under Law (John C. Brittain, Michael L. Foreman, and  
15 Nicole J. DeSario, Washington, D.C., *of counsel*), The National  
16 Black Police Association, The National Association of Black Law  
17 Enforcement Officers, The National Association for the  
18 Advancement of Colored People (Angela Ciccolo and Victor  
19 Goode, *of counsel*), The International Association of Black  
20 Professional Fire Fighters, and The National Asian Pacific  
21 American Legal Consortium (*Vincent Eng, of counsel*).

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23  
24 CALABRESI, *Circuit Judge*:

25 The Government as employer bears a special burden. Absent contrary legislation, a  
26 private employer may regulate the workplace environment, and hire, fire, and promote as it  
27 pleases. The Government enjoys no such freedom. As the Supreme Court has said, “the state and  
28 federal governments, even in the exercise of their internal operations, do not constitutionally  
29 have the complete freedom of action enjoyed by a private employer.” *Cafeteria & Rest. Workers*  
30 *Union, Local 473 v. McElroy*, 367 U.S. 886, 897-98 (1961). The Government as employer may  
31 not discriminate arbitrarily, regardless of the statutory regime, *see Rutan v. Republican Party of*  
32 *Ill.*, 497 U.S. 62, 98 (1990), and conspicuously unlike a private employer, it must respect its  
33 employees' First Amendment rights to free speech, *see City of San Diego v. Roe*, 543 U.S. 77, 80

1 (2004).

2 At the same time, the Supreme Court has recognized, in a variety of doctrinal contexts,  
3 that “the status of the Government as a . . . market participant must be sharply distinguished from  
4 the status of the Government as regulator or administrator.” *Dir., Office of Workers’ Comp.*  
5 *Programs v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 128 (1995). As a result,  
6 even the Government as an employer, and hence as a consumer of labor, must retain some  
7 freedom to dismiss employees who do not meet the reasonable requirements of their jobs. In the  
8 case before us, we must reconcile a Government employee’s right to engage in protected speech  
9 with the right of a Government employer “to protect its own legitimate interests in performing its  
10 mission.” *Roe*, 543 U.S. at 82.

11 The plaintiffs — former New York Police Department (“NYPD”) officer Joseph Locurto  
12 and former New York Fire Department (“FDNY”) firefighters Jonathan Walters and Robert  
13 Steiner — brought suit against the defendants — former New York City Mayor Rudolph  
14 Giuliani, former NYPD Commissioner Howard Safir, former FDNY Commissioner Thomas Von  
15 Essen, and the City of New York — claiming that they were illegally fired from their positions in  
16 the NYPD and the FDNY in retaliation for their participation in a Labor Day parade, on a float  
17 that featured mocking stereotypes of African-Americans. The district court entered judgment for  
18 the plaintiffs, holding that they were discharged, not on any legitimate grounds, such as the  
19 disruption or threat of disruption that their actions had caused to the operations of the police and  
20 fire departments, but in retaliation for the content of their speech, and hence in violation of the  
21 First and Fourteenth Amendments. Because we conclude that the defendants fired the plaintiffs  
22 out of a reasonable concern for disruption, and that this concern outweighed the plaintiffs’

1 individual expressive interests, we reverse the district court, and remand the case to that court  
2 with instructions to enter judgment for the defendants.

3  
4 Background  
5

6 Each of the three plaintiffs is a white resident of Broad Channel, a small, predominantly  
7 white, island community in southeast Queens. Locurto, a Broad Channel native, was an NYPD  
8 officer from 1994 until his termination in October 1998. During that time, he was assigned to the  
9 racially-mixed 104th precinct in Queens and received consistently positive reviews from his  
10 supervisors there. Steiner, who has lived in Broad Channel since 1996, was an FDNY firefighter  
11 from 1996 until October 1998. At the time of his firing, Steiner was assigned to Ladder 17 in the  
12 South Bronx, a 98 percent minority community. There had never been any reported problems  
13 between Steiner and his colleagues or the public. Walters is a lifelong Broad Channel resident  
14 who joined the FDNY in 1990. For the three years leading up to his discharge in October 1998,  
15 he worked at Engine Company 231 in Brownsville, a predominantly African-American and  
16 Hispanic neighborhood in Brooklyn. All of Walters’s performance evaluations during his FDNY  
17 tenure showed a rating of “satisfactory” or higher, and he had no reported difficulty with any of  
18 his fellow firefighters, four of whom were African-American.

19  
20 The Float  
21

22 Each year, Broad Channel plays host to a loosely organized Labor Day parade. The  
23 parade features, among other things, floats with varying themes and of varying degrees of  
24 sophistication. Local politicians award prizes to floats designated, for example, “prettiest,” “most  
25 original,” and “funniest.” In each of the nine years leading up to 1998, the prize for funniest float

1 was awarded to a particular group of individuals who entered floats that often, but not always,  
2 featured racial, ethnic, or other stereotypes, and that played off themes from popular culture. In  
3 1994, for example, this group entered a float entitled “Hasidic Park,” a play on the film *Jurassic*  
4 *Park*, that featured stereotypes of Hasidic Jews living in prehistoric times. The group’s 1996  
5 float, called “Gooks of Hazard,” depicted Asian stereotypes. Another year, the float styled itself  
6 “Happy Gays” and made fun of gay men. Steiner and Walters participated in each of these floats,  
7 and Locurto in the 1996 and 1997 floats. There is no evidence that any of the previous floats  
8 generated any substantial contemporaneous controversy or public attention.

9 For the September 7, 1998 Labor Day parade, the group, which included the plaintiffs,  
10 decided to enter a float called “Black to the Future – Broad Channel 2098.” The conceit, a play  
11 on the 1985 time-travel film *Back to the Future*, was to depict how Broad Channel would look in  
12 2098 when, presumably, the community would be more integrated than it was in 1998. Each of  
13 the float participants, including the plaintiffs, covered their faces in black lipstick, donned Afro  
14 wigs, and accompanied the float along the procession in attire ranging from overalls with no T-  
15 shirt underneath, to cut-off jeans and ratty T-shirts, to athletic pants and sweatshirts. The float  
16 itself featured two buckets of Kentucky Fried Chicken on the hood of a flatbed truck. One of the  
17 participants (not a plaintiff in this case) ate a watermelon and at one point threw the remains into  
18 the crowd. The float participants engaged in various chants, including, “No Justice, No Peace,”  
19 “This isn’t Johannesburg,” and “We didn’t land on Broad Channel, Broad Channel landed on  
20 us.”<sup>1</sup> Plaintiffs Steiner and Walters yelled to the crowd, “Crackers, we’re moving in,” and

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1 <sup>1</sup> The reference, one presumes, is to a line attributed to Malcolm X — “We didn’t land on  
2 Plymouth Rock, Plymouth Rock landed on us,” see Malcolm X (40 Acres & A Mule Filmworks  
3 1992) — and not to the title song from Cole Porter’s *Anything Goes*, which contains a similar

1 Walters simulated “break dancing” alongside the float.

2           Near the end of the procession, and apparently without the others’ knowledge, Walters  
3 held onto the truck’s tailgate, pretending to be dragged by the truck, and yelled, “Look what they  
4 did to our brother in Texas, we would not allow them here . . . .” The scene was intended to  
5 invoke and parodically recreate the dragging death of James Byrd, Jr., an African-American man  
6 who had been murdered months earlier outside of Jasper, Texas after being chained to the back  
7 of a moving pickup truck by three white men.

8           The float never reached the viewing stand to be sized up for the annual funniest float  
9 prize because a thunderstorm ended the parade early.

10  
11 Reaction to the Float

12  
13           The next evening, a local news broadcast aired amateur video footage of the float in a  
14 piece entitled “Racist Float.” Extensive press coverage followed immediately, with the *New York*  
15 *Times* reporting three days later on the front of its Metro section that, according to “city  
16 officials,” New York City police officers and firefighters had taken part in the float. *See* David  
17 W. Chen, *Officers and Firemen Wore Blackface on Float, Officials Say*, N.Y. Times, Sept. 11,  
18 1998, at B1. The paper quoted Mayor Guiliani as saying, in a statement, ““I’ve spoken to  
19 Commissioners Safir and Von Essen and we all agree that any police officer, firefighter or other  
20 city employee involved in this disgusting display of racism should be removed from positions of  
21 responsibility immediately. . . . They will be fired.”” *Id.*

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1 line, *see* Paul Whiteman with Ramona Davies, *Anything Goes* (RCA Victor 1934) (“Times have  
2 changed / and we’ve often rewound the clock / since the Puritans got a shock / when they landed  
3 on Plymouth Rock. / If today, / any shock they should try to stem, / ’stead of landing on  
4 Plymouth Rock, / Plymouth Rock would land on them.”).

1           On the afternoon of September 11, 1998, the day the *Times* story ran, Locurto learned that  
2 the NYPD wanted to speak to him about his participation in the float. He contacted the  
3 Department’s Legal Bureau through an attorney and said that he had, in fact, participated; shortly  
4 thereafter, with no further inquiry into the nature of Locurto’s involvement, the NYPD suspended  
5 him without pay. Also on September 11, Steiner and Walters appeared voluntarily before Von  
6 Essen to report their participation in the float. They, too, were subsequently suspended without  
7 pay. Von Essen told Steiner and Walters that, were it up to him, he would not fire them, but that  
8 his hands were tied.

9           More media attention followed. On Saturday, September 12, Rev. Al Sharpton led a  
10 group of demonstrators through the streets of Broad Channel. In a story appearing the same day,  
11 Giuliani was quoted as saying of the plaintiffs, “They’re technically suspended, but they’re never  
12 getting back into the Police Department or the Fire Department unless the Supreme Court of the  
13 United States ordered us to take them back.” Gene Mustain, *Float Firefighters Shelved*, Daily  
14 News (N.Y.), Sept. 12, 1998, at 7. Giuliani was also quoted as saying, “Police officers [and]  
15 firefighters carry a very heavy responsibility . . . to treat people fairly. That responsibility cannot  
16 be placed in doubt.” *Id.* (alterations in original). A *New York Times* story that ran the next day  
17 further quoted Giuliani as saying, “I’m not going to take the responsibility of keeping [Locurto]  
18 on the police force and then three years from now he hurts somebody and somebody wants to  
19 know why he wasn’t removed.” Kit R. Roane, *Suspended Police Officer Apologizes, Calling*  
20 *Float ‘a Big Mistake,’*” N.Y. Times, Sept. 13, 1998, at 51.

21           The plaintiffs’ float and Giuliani’s comments came in the immediate wake of a  
22 controversy over the NYPD’s handling of the September 5, 1998 “Million Youth March.”

1 Giuliani had publicly denounced the march organizer, calling former Nation of Islam official  
2 Khalid Abdul Muhammad a “hatemonger” over comments, which Giuliani regarded as offensive,  
3 that Muhammad had made about Jews and Catholics. The City initially denied a permit to march  
4 organizers, but a permit issued after the organizers obtained a federal injunction. *See Million*  
5 *Youth March, Inc. v. Safir*, 18 F. Supp. 2d 334 (S.D.N.Y. 1998). Some of Giuliani’s critics later  
6 objected that the NYPD used excessive force to break up the march shortly after it ended.

7  
8 Locurto’s NYPD Hearing  
9

10 The NYPD filed two charges against Locurto on September 14, 1998: (1) “conduct  
11 prejudicial to the good order, efficiency and discipline of the Department” by participating in a  
12 Labor Day parade float “which depicted African-Americans in a demeaning and offensive  
13 manner” (“Specification No. 1”), and (2) “knowingly associat[ing] with person(s) or  
14 organization(s) advocating hatred, or oppression of, or prejudice toward a racial or religious  
15 group” (“Specification No. 2”). Under NYPD administrative procedures, such charges must be  
16 adjudicated at a hearing before the Deputy Commissioner of Trials. The Deputy Commissioner  
17 then issues a Report and Recommendation to the Police Commissioner, who makes a final  
18 determination.

19 Locurto’s hearing was held October 5, 1998, before Deputy Commissioner of Trials Rae  
20 Downes Koshetz. Locurto and the Department agreed to two stipulations of fact to be entered at  
21 the hearing: (1) that the NYPD had not terminated any officer solely for having engaged in  
22 racially offensive speech or expression since January 1991, and (2) that the NYPD had no  
23 knowledge of any case in which charges were filed against an officer for alleged violation of

1 Specification No. 1 since January 1, 1980.

2 Each side presented two witnesses. The Department offered James Trudden, an NYPD  
3 detective and chief of the Broad Channel Volunteer Fire Department, and James O’Keefe, the  
4 NYPD’s Director of Training. Trudden testified to the particulars of the Labor Day Parade, in  
5 which the Volunteer Fire Department also regularly participated. Trudden also said that when he  
6 saw the news report the day after the parade, he recognized the plaintiffs personally from having  
7 lived with them in Broad Channel. O’Keefe testified to the professionalism training Locurto had  
8 received. O’Keefe noted that the training program emphasized the lack of any distinction  
9 between on-duty and off-duty behavior.

10 Locurto appeared on his own behalf. He discussed his involvement in past years’ floats  
11 and his participation in the 1998 float. He said he had not used any racial slurs or thrown any  
12 objects, and that he had been unaware, when the procession began, that Walters would re-enact  
13 the murder of James Byrd, Jr. On cross-examination, Locurto said that his only purpose in  
14 entering the float was to win the prize for funniest float, and that he did not intend for the float to  
15 represent political commentary.

16 Locurto’s second witness was Rev. Sharpton, who testified to the motivation behind the  
17 protest he organized. The float, Sharpton said, “was indicative of a systemic problem where  
18 people high in the Police Department and Fire Department apparently allow an annual event  
19 going on parodying people.” Locurto Hearing Transcript at 239. Sharpton said that he and his  
20 followers “felt the Mayor who was in political trouble because the nation watched the films of  
21 the Million Youth March and was trying to scapegoat the police officer and firemen to try to be a  
22 balancing. [sic]” *Id.*

1           Locurto wanted to depose Giuliani and Safir and question them on their motivations for  
2 suspending him, but Deputy Commissioner Koshetz denied him leave to depose them.

3           After listening to testimony and closing arguments, Deputy Commissioner Koshetz  
4 recommended that Locurto be found guilty of Specification No. 1, but recommended that  
5 Specification No. 2 be dismissed. She concluded, based on Locurto’s testimony, that the float did  
6 not express an opinion on “a matter of public concern,” but rather “was designed to mimic and  
7 mock a racial group for the amusement of the participants and spectators.” *In re Charges and*  
8 *Specifications against Police Officer Joseph Locurto*, Case No. 73662/98, at 11 (NYPD Oct. 9,  
9 1998). Moreover, Deputy Commissioner Koshetz found, given the negative media coverage and  
10 public response that followed the parade, the NYPD had made “an ample showing of both actual  
11 and potential disruption of the Department’s working relationships among members of its own  
12 work force as well as its ability to function effectively in the multi-cultural environment of our  
13 city.” *Id.* at 14. Deputy Commissioner Koshetz concluded that, “[i]n light of the egregiousness of  
14 [Locurto’s] misconduct and the overwhelmingly negative notoriety this has wrought upon [the]  
15 Department and upon thousands of his colleagues who have never thought or acted out in this  
16 fashion,” the appropriate discipline was to dismiss Locurto from the police force. *Id.* at 20-21.

17           Effective October 10, 1998, Safir adopted the recommendation and ended Locurto’s  
18 NYPD employment.

19  
20 Steiner’s and Walters’s FDNY Hearing  
21

22           The same month, an administrative law judge (“ALJ”), Rosemarie Maldonado, held a  
23 hearing on charges filed against Steiner and Walters by the FDNY. Each was accused of

1 violating three FDNY regulations: (1) “engaging in an activity instrumental in arousing racial  
2 hatred” (“Charge No. 1”); (2) “conduct unbecoming,” for “taking part in . . . a float which  
3 depicted African-Americans in a humiliating, callous, and demeaning manner” and for taking  
4 part in a reenactment of the James Byrd, Jr. murder (“Charge No. 2”); and (3) violating their  
5 oaths of office (“Charge No. 3”).

6 The FDNY called as witnesses, among others, William Feehan, the Department’s first  
7 deputy commissioner, Steven DeRosa, its chief of training, and Trudden. Feehan opined as to  
8 how the public reaction to the floats might have a negative impact on minority recruiting,  
9 community relations, and Department morale. Trudden discussed the impact of the float on the  
10 Broad Channel Volunteer Fire Department which, after the 1998 parade, began to receive hostile  
11 phone calls, experienced rock throwing, and was labeled racist by members of the media. He also  
12 suggested that the incident had caused the City to rescind a land sale to the Volunteer Fire  
13 Department.

14 Steiner and Walters offered their own testimony as well as that of seven firefighters —  
15 two of whom were African-American — with whom they had worked. All seven firefighters,  
16 four of whom had worked with Steiner and three of whom had worked with Walters, testified  
17 that they had never witnessed any racist conduct by either Steiner or Walters, and all said they  
18 would welcome the chance to work with Steiner or Walters again were they to return to the  
19 Department. Steiner testified that the purpose of the float was not to be racist, but “to mimic the  
20 community’s image of racism and what they thought of a stereotype and to poke fun at them.”  
21 Steiner and Walters Hearing Transcript at 253. Walters said that he had mocked the dragging  
22 death of James Byrd, Jr. in order to “portray stereotypes of the community facing racial

1 integration, a somewhat closed community and to say that we wouldn't allow this to happen in  
2 Broad Channel.” *Id.* at 304.

3 Steiner and Walters sought leave to call Von Essen to testify about a conversation in  
4 which he allegedly said that Giuliani ordered him to fire them, but ALJ Maldonado refused to  
5 allow the testimony on the ground that it would be only “marginally . . . relevant” and could be  
6 obtained in other ways. *Id.* at 164.

7 The ALJ recommended that Steiner and Walters be found guilty of Charge No. 2  
8 (“conduct unbecoming”) and Charge No. 3 (violating their oaths of office), but that Charge No. 1  
9 (“arousing racial hatred”) be dismissed. Unlike the NYPD hearing officer, ALJ Maldonado found  
10 that Steiner and Walters “intended to communicate a message on a matter of public concern[;]” to  
11 wit, “[t]hey were making a social statement about the future residents of their community.” *Fire*  
12 *Dep’t v. Steiner*, Nos. 559 & 560/99, at 12-13 (City of New York Office of Admin. Trials &  
13 Hearings Oct. 16, 1998). She found disingenuous, however, Steiner’s and Walters’s avowals that  
14 the float was intended “to promote an integrationist message,” *id.* at 13, finding instead that  
15 “[t]here is no credible evidence that the float’s message was anything but racist,” *id.* at 16. The  
16 ALJ then concluded that Steiner and Walters were fired based on reasonable concerns over the  
17 negative impact their speech might have on the perception of the FDNY within minority  
18 communities and on minority recruitment of firefighters. *Id.* at 21-25.

19 As to penalty, the ALJ recommended that Steiner and Walters be fired.<sup>2</sup> *Id.* at 30. Von

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1 <sup>2</sup> Only three remedial options were available to the ALJ: reprimand, loss of 10 days’ pay,  
2 or dismissal from the Fire Department. *See* New York City Admin. Code § 15-113. The ALJ said  
3 that loss of three months’ pay would be more appropriate than dismissal, but that loss of 10 days’  
4 pay was too lenient. *Steiner*, Nos. 559 & 560/99, at 28-29.

1 Essen adopted the ALJ's recommendation and discharged Steiner and Walters on October 26,  
2 1998.

3  
4 District Court Opinion  
5

6 The plaintiffs filed their complaints individually in September 1998, and the three cases  
7 were later consolidated. *See Locurto v. Safir*, 264 F.3d 154, 161 (2d Cir. 2001) (*Locurto I*). The  
8 complaints, filed pursuant to 42 U.S.C. § 1983, alleged that the plaintiffs had been suspended in  
9 retaliation for their exercise of First Amendment rights and that they had been deprived of  
10 constitutionally protected employment interests without due process of law in violation of the  
11 Fourteenth Amendment. *See id.* The complaints were subsequently amended to include pendent  
12 state law claims. *Id.*

13 Prior to discovery, both sides moved for summary judgment. The plaintiffs contended  
14 that the evidence of disruption of NYPD and FDNY operations was insufficient and that Giuliani  
15 had ordered the plaintiffs' dismissals before any administrative hearings were held, thereby  
16 indicating that the dismissals were impermissibly retaliatory. *See id.* The defendants argued for  
17 summary judgment on the grounds that (1) the plaintiffs' federal claims were collaterally  
18 estopped by the administrative determinations; (2) even if not estopped, the plaintiffs had failed  
19 to state valid First and Fourteenth Amendment claims; and (3) the individual defendants were  
20 entitled to qualified immunity. *See id.*

21 The district court denied both motions without prejudice. *Locurto v. Giuliani*, 95 F. Supp.  
22 2d 161, 168 (S.D.N.Y. 2000). Judge Sprizzo ruled that there were factual disputes as to whether  
23 the plaintiffs had received a full and fair opportunity to litigate their First Amendment claims at

1 their disciplinary hearings, and so the extent to which the findings at those hearings could be  
2 given preclusive effect was not clear on the pleadings. *See id.* at 167-68. Moreover, the district  
3 court held that whether the defendants were entitled to qualified immunity could not be resolved  
4 at the summary judgment stage because it could not yet be determined whether their actions in  
5 terminating the plaintiffs were “objectively reasonable.” *See id.* at 168 (citing *Dangler v. New*  
6 *York City Off Track Betting Corp.*, 193 F.3d 130, 140-41 (2d Cir. 1999)).

7 The defendants brought an interlocutory appeal of the district court’s refusal to grant  
8 summary judgment on the issue of qualified immunity. *See Locurto I*, 264 F.3d at 162. A panel  
9 of this Court held that we lacked jurisdiction over the qualified immunity appeal as it related to  
10 the plaintiffs’ First Amendment claims because the appeal turned on factual issues with respect  
11 to the defendants’ motives, on which the district court had to reach a final decision in the first  
12 instance for appellate jurisdiction to lie. *See id.* at 170. But, at the same time, we dismissed the  
13 plaintiffs’ due process claim in its entirety, rejecting the argument that the plaintiffs were owed  
14 an administrative hearing before a neutral decisionmaker, in light of the availability, under New  
15 York law, of appellate review through a neutral Article 78 proceeding. *See id.* at 174-75.

16 Judge Sprizzo subsequently conducted a three-day bench trial. The court heard testimony  
17 from each of the six individual parties, as well as from Lynn Tierney, the former FDNY Deputy  
18 Commissioner of Internal Affairs, and Sheldon Wright, the former FDNY Director of  
19 Employment Initiatives. The plaintiffs argued that their participation in the float was humorous  
20 commentary on a matter of public concern, namely the prospective integration of a  
21 predominantly white community, and was therefore fully protected speech under the First  
22 Amendment. The defendants argued that (a) both the factual findings and the legal conclusions of

1 the administrative hearings collaterally estopped the plaintiffs' First Amendment claims; (b) the  
2 plaintiffs' speech was not on a matter of public concern and therefore was not protected under  
3 the First Amendment from adverse employment action; and (c) even if the plaintiffs' speech was  
4 protected, the defendants' actions were legally justified by a concern over the potential disruption  
5 that the plaintiffs' speech might cause to the effective operations of the NYPD and the FDNY.

6 In a written opinion dated June 23, 2003, the district court ruled in the plaintiffs' favor.  
7 *Locurto v. Giuliani*, 269 F. Supp. 2d 368 (S.D.N.Y. 2003). The court found that the  
8 administrative determinations were not entitled to collateral estoppel effect because the plaintiffs,  
9 having been denied discovery into the defendants' motives, did not receive a full and fair  
10 opportunity to litigate the crucial issue of the motivation behind their dismissals. *See id.* at 382.  
11 As to the First Amendment claims, the district court held that the plaintiffs' participation in the  
12 float was protected speech on a matter of public concern, and that the defendants had improperly  
13 fired the plaintiffs in retaliation for the content of that speech rather than over any reasonable  
14 concern for potential disruption. *See id.* at 388, 395. Because, the district court held, the  
15 defendants acted out of an improper motive, they were not entitled to qualified immunity under  
16 our holding in *Locurto I* that "it can never be objectively reasonable for a government official to  
17 act with the intent that is prohibited by law." *Locurto I*, 264 F.3d at 169 (citing *Crawford-El v.*  
18 *Britton*, 523 U.S. 574, 589 (1998)), *cited in Locurto*, 269 F. Supp. 2d at 402 n.23.

19 The district court issued final judgment in November 2004, and ordered all three  
20 plaintiffs reinstated to their former positions. Judge Sprizzo also awarded compensation for lost  
21 wages and benefits. The defendants timely filed notice of appeal on December 10, 2004.



1 administrative hearing. *See generally Burkybile v. Bd. of Educ.*, 411 F.3d 306, 312 (2d Cir.  
2 2005). Accordingly, before proceeding to the merits of the defendants’ appeal, we must first  
3 address the preclusive effect, if any, of the findings of the administrative hearings. If collateral  
4 estoppel does not attach to those findings, we may then review the district court’s factual and  
5 legal findings to determine if the firings of the plaintiffs by the defendants were consistent with  
6 the City’s obligations under the First and Fourteenth Amendments.

7  
8 I.  
9

10 The Supreme Court has held that, as a matter of federal common law issue preclusion,  
11 “when a state agency acting in a judicial capacity . . . resolves disputed issues of fact properly  
12 before it which the parties have had an adequate opportunity to litigate, federal courts must give  
13 the agency’s factfinding the same preclusive effect to which it would be entitled in the State’s  
14 courts.” *Univ. of Tennessee v. Elliott*, 478 U.S. 788, 799 (1986) (internal quotation marks and  
15 citations omitted; alterations in original). The state courts of New York “give quasi-judicial  
16 administrative fact-finding preclusive effect where there has been a full and fair opportunity to  
17 litigate.” *Burkybile*, 411 F.3d at 310. In addition, for collateral estoppel to give preclusive effect  
18 to administrative agency findings, “the issue sought to be precluded [must be] identical to a  
19 material issue necessarily decided by the administrative agency in a prior proceeding.” *Jeffreys v.*  
20 *Griffin*, 801 N.E.2d 404, 407 (N.Y. 2003).

21 The district court held that the plaintiffs did not receive a full and fair opportunity to  
22 litigate their First Amendment retaliation claims because they were denied adequate discovery  
23 into the defendants’ motivations for firing them. *Locurto*, 269 F. Supp. 2d at 382. We agree.

1 Deputy Commissioner Koshetz did not permit Locurto to depose Giuliani and Safir, and ALJ  
2 Maldonado thought the testimony of Von Essen would be only minimally probative. As Judge  
3 Sprizzo noted, however, “far from being ‘marginal,’ such discovery and/or testimony is relevant  
4 and necessary to plaintiffs’ case.” *Id.* An opportunity to litigate is neither full nor fair when a  
5 litigant is denied discovery, available in the ordinary course, into matters going to the heart of his  
6 claim. *Cf. United States v. U.S. Currency in the Amount of \$119,984.00*, 304 F.3d 165, 177-78  
7 (2d Cir. 2002) (refusing, in a civil forfeiture action, to give collateral estoppel effect to findings  
8 from a criminal case because, owing to discovery limitations in criminal trials, “the Government .  
9 . . would have been precluded from obtaining probative testimonial and documentary evidence  
10 from [the claimant]”). Where, as here, a Government employee claims to have been fired for an  
11 unconstitutional reason, discovery into the reason he was fired is, to say the least, relevant.<sup>3</sup>

12 We note, moreover, that a § 1983 plaintiff is not bound by the findings of an  
13 administrative hearing if he is “deprived of the opportunity to litigate his claim fully and fairly  
14 before a *neutral arbitrator*.” *Colon v. Coughlin*, 58 F.3d 865, 871 (2d Cir. 1995) (emphasis  
15 added). Although no allegation has been made that either of the hearing officers was biased, it is  
16 undisputed that the decisionmakers were not the hearing officers, but rather Von Essen and Safir.  
17 *See* 3 Rules of the City of New York (“RCNY”) § 2-01(b); 38 RCNY § 15-08(a). The district  
18 court made a factual finding that “as of September 10, 1998, if the facts surrounding the Labor

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1 <sup>3</sup> ALJ Maldonado’s denial of Steiner’s and Walters’s request to call Von Essen might  
2 have been motivated by her suggestion that the motivating factor behind the suspension decision  
3 was “not in dispute.” To the extent the agency considered this issue not to be contested, the  
4 district court’s findings as to Von Essen’s motivation are not “identical to a material issue  
5 necessarily decided by the administrative agency in a prior proceeding,” *Jeffreys*, 801 N.E.2d at  
6 407, and therefore are not precluded by the findings of the administrative hearing.

1 Day float were as initially assumed to be, the Mayor and Commissioners had decided that  
2 plaintiffs would be terminated.” *Locurto*, 269 F. Supp. 2d at 390-91. If this finding was not  
3 clearly erroneous, then the ultimate decisionmakers in each of the two hearings made a  
4 determination as to the outcome of the hearings in advance, and therefore were not neutral  
5 arbitrators. As we discuss *infra*, the district court’s finding as to the timing of the decision to  
6 terminate the plaintiffs was not clearly erroneous. As such, the plaintiffs did not receive hearings  
7 before neutral arbitrators, and collateral estoppel does not attach to the findings of those  
8 hearings.<sup>4</sup>

## 9 10 II.

11  
12 The Supreme Court’s First Amendment employment retaliation jurisprudence was not  
13 made for the situation before us. The seminal case, *Pickering v. Bd. of Educ.*, 391 U.S. 563  
14 (1968), involved the First Amendment claims of a public school teacher who was dismissed by  
15 the Board of Education of Will County, Illinois, after a letter she wrote criticizing the Board’s  
16 funding choices and purported lack of transparency was published in a local newspaper. Another

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1  
2 <sup>4</sup> This is not to say that a neutral arbitrator at a pre-termination administrative hearing is a  
3 requirement of *due process*. As we held in *Locurto I*, a pre-termination hearing before a non-  
4 neutral adjudicator may yet comport with due process “where the state affords plaintiff,  
5 subsequent to his termination, a full adversarial hearing before a neutral adjudicator.” *Locurto I*,  
6 264 F.3d at 174. But, contrary to the defendants’ argument, the fact that the availability of post-  
7 termination review via an Article 78 proceeding is sufficient to satisfy due process does not mean  
8 that it is sufficient to confer collateral estoppel effect upon pre-termination hearing findings. The  
9 cases the defendants cite for this proposition hold only that, under New York law, the  
10 opportunity to appeal an adverse finding is *necessary* for collateral estoppel to attach; they do not  
11 hold that it is *sufficient*. See *Fletcher v. ATEX, Inc.*, 68 F.3d 1451, 1458 (2d Cir. 1995) (citing  
12 *People v. Medina*, 617 N.Y.S.2d 491, 493 (App. Div. 2d Dep’t 1994)); *Crespo v. New York City*  
13 *Police Comm’r*, 930 F. Supp. 109, 114 (S.D.N.Y. 1996); *Williams v. Moore*, 602 N.Y.S.2d 199,  
201-02 (App. Div. 2d Dep’t 1993).

1 leading Supreme Court case, *Connick v. Myers*, 461 U.S. 138 (1983), concerned an assistant  
2 district attorney who was fired for distributing a workplace survey that questioned office policies.  
3 More recently, *Waters v. Churchill*, 511 U.S. 661 (1994) (plurality opinion), involved a nurse  
4 who was dismissed for complaining about her supervisor. Each of these Supreme Court cases  
5 represents a version of the paradigm First Amendment retaliation case, in which a public  
6 employee suffers adverse employment action for criticizing her employer.<sup>5</sup>

7         The two-step inquiry that has emerged from these cases — often called the “*Pickering*  
8 test” — asks first whether the employee spoke “as a citizen upon matters of public concern,” as  
9 opposed to “as an employee upon matters only of personal interest.” *Connick*, 461 U.S. at 147. If  
10 the speech was on matters of purely personal concern, “the government is granted wide latitude  
11 to deal with the employee without any special burden of justification.” *Melzer v. Bd. of Educ.*,  
12 336 F.3d 185, 193 (2d Cir. 2003); see *United States v. Nat’l Treasury Employees Union*, 513  
13 U.S. 454, 466 (1995) (*Treasury Union*). If, on the other hand, the employee spoke on a matter of  
14 public concern, a court must balance “the employee’s interest in expressing herself” against “any  
15 injury the speech could cause to ‘the interest of the State, as an employer, in promoting the  
16 efficiency of the public services it performs through its employees.’” *Waters*, 511 U.S. at 668  
17 (quoting *Connick*, 461 U.S. at 142).

18         Once an employee demonstrates that her speech was the motivating factor behind an  
19 adverse employment action, the burden shifts to the Government “to make a substantial showing  
20 of *likely* interference.” *Jeffries v. Harleston*, 52 F.3d 9, 13 (2d Cir. 1995) (*Jeffries II*). The

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1             <sup>5</sup> *Ceballos v. Garcetti*, 361 F.3d 1168 (9th Cir. 2004), *cert. granted*, 543 U.S. 1186  
2 (2005), a First Amendment retaliation case in which the Supreme Court recently reheard oral  
3 argument, is also of this sort.



1 Under our cases, the first step in the *Pickering* inquiry is to determine whether an  
2 employee is speaking on a matter of public concern. The question of whether a public  
3 employee’s First Amendment activity relates to a matter of public concern “is ordinarily a  
4 question of law decided on the whole record by taking into account the content, form, and  
5 context of a given statement.” *Melzer*, 336 F.3d at 196. Thus, in the Supreme Court case of  
6 *Rankin v. McPherson*, 483 U.S. 378 (1987), a data entry employee in a county constable’s office  
7 who said of an attempt on President Reagan’s life, “[I]f they go for him again, I hope they get  
8 him,” was speaking on a matter of public concern because her comments were “made in the  
9 course of a conversation addressing the policies of the President’s administration.” *Id.* at 381,  
10 386. The Court made clear that “[t]he inappropriate or controversial character of a statement is  
11 irrelevant to the question [of] whether it deals with a matter of public concern.” *Id.* at 387.

12 More recently, a panel of our Court held that an active member of the North American  
13 Man/Boy Love Association (“NAMBLA”) and the editor of the NAMBLA bulletin, who was  
14 fired as a high school teacher after his association with the organization was revealed, was likely  
15 engaged in First Amendment activity on a matter of public concern. *Melzer*, 336 F.3d at 196. We  
16 said that “[a]dvocacy for a change in public perception and law, a fundamental component of  
17 democracy, is certainly a matter of public concern, regardless of the underlying subject matter.”  
18 *Id.*; *cf. Cobb v. Pozzi*, 363 F.3d 89, 102 (2d Cir. 2003) (holding that the public concern test  
19 applies to freedom of association claims). It is not sufficient, on the other hand, that speech be  
20 directed at the public in order to pass the public concern test. Thus, in *City of San Diego v. Roe*,  
21 the Supreme Court held that a San Diego police officer who auctioned, on eBay, videotapes of  
22 himself stripping off a generic police uniform and masturbating was not speaking on a matter of

1 public concern. “[P]ublic concern,” the Court said, “is something that is a subject of legitimate  
2 news interest; that is, a subject of general interest and of value and concern to the public at the  
3 time of publication.” *Roe*, 543 U.S. at 83-84.

4           Some courts, including both our Court and the Supreme Court, have questioned the extent  
5 to which the public concern test applies to off-duty speech on topics unrelated to employment.  
6 The Supreme Court noted in *Roe* that, under its previous decision in *Treasury Union*, “when  
7 government employees speak or write on their own time on topics unrelated to their employment,  
8 the speech can have First Amendment protection, absent some governmental justification ‘far  
9 stronger than mere speculation’ in regulating it.” *Roe*, 543 U.S. at 80 (quoting *Treasury Union*,  
10 513 U.S. at 475). In *Treasury Union*, in which the Court struck down a ban on honoraria for  
11 speeches and articles by Government employees, the Court held that the Government could not  
12 justify a ban on speech outside of the workplace and unrelated to Government employment on  
13 grounds of workplace disruption, and that the ban was an overly broad prophylactic against  
14 abuse. *Treasury Union*, 513 U.S. at 472-74. *Roe* distinguished *Treasury Union* on the grounds  
15 that the police officer in *Roe*, who identified himself as employed in law enforcement on the  
16 auction site, “took deliberate steps to link his videos and other wares to his police work, all in a  
17 way injurious to his employer.” *Roe*, 543 U.S. at 81. In this sense, *Roe*’s commercial activities  
18 were, in effect, related to his employment and so could not be evaluated under the *Treasury*  
19 *Union* framework. *See id.*

20           The *Roe* Court’s treatment of off-duty speech that is “detrimental to the mission and  
21 functions of the employer,” *id.* at 84, as “outside the protection afforded in [*Treasury Union*],”  
22 *id.* at 82, underscores the fact that the public concern test does not apply neatly as a *threshold* test

1 for expression unrelated to Government employment. *See Treasury Union*, 513 U.S. at 480  
2 (O'Connor, *J.*, concurring in the judgment in part and dissenting in part) (“In contrast to some of  
3 our prior decisions, this case presents no threshold question whether the speech is of public, or  
4 merely private, concern. Respondents challenge the ban as it applies to off-hour speech bearing  
5 no nexus to Government employment-speech . . .”). The public concern inquiry, developed  
6 within the context of on-the-job expressive activity, was intended to provide heightened  
7 protection to workplace speech that was close to the First Amendment’s core, that is, speech that  
8 “constituted the ‘essence of self-government.’” *Cobb*, 363 F.3d at 104 (quoting *Connick*, 461  
9 U.S. at 145). As the *Treasury Union* Court recognized, however, a negative answer to the public  
10 concern question was not meant to license wholesale Government disregard of employee speech  
11 rights, especially outside of the workplace. *See, e.g., Berger v. Battaglia*, 779 F.2d 992, 998 (4th  
12 Cir. 1985) (“*Pickering*, its antecedents, and its progeny — particularly *Connick* — make it plain  
13 that the ‘public concern’ or ‘community interest’ inquiry is better designed — and more  
14 concerned — to identify a narrow spectrum of employee speech that is not entitled even to  
15 qualified protection than it is to set outer limits on all that is.”). Indeed, mechanically applying a  
16 categorical public concern test to off-duty speech unrelated to Government employment would  
17 lead to the somewhat anomalous result that the Government would have far *less* latitude to  
18 dismiss an employee for a *public* display of racism involving public concerns than it has for, say,  
19 speech that was uttered in the privacy of the employee’s bedroom but was not on a matter of  
20 public concern. *See* Pengtian Ma, *Public Employee Speech and Public Concern: A Critique of*  
21 *the U.S. Supreme Court’s Threshold Approach to Public Employee Speech Cases*, 30 *J. Marshall*  
22 *L. Rev.* 121, 143 n.140 (1996) (“It is no business of the public employer’s as to what an

1 employee chooses to wear at an off-duty party if its interest in office operation is not in any way  
2 jeopardized. In such a situation, there is ever more need for balancing the interest of the  
3 government against that of the employee.”).

4 It is more sensible, instead, to treat off-duty, non-work-related speech as presumptively  
5 entitled to First Amendment protection regardless of whether, as a threshold matter, it may be  
6 characterized as speech on a matter of public concern. As our Court has recognized implicitly,  
7 the closeness of a Government employee’s off-duty, non-work-related speech to the heart of the  
8 First Amendment then becomes relevant as part of the *Pickering* balancing test, to be weighed  
9 against the Government’s interest only *after* the Government meets its burden of identifying a  
10 reasonable potential for disruption. *See generally Melzer*, 336 F.3d at 194 (“Attenuation of time,  
11 place, or content of speech from the workplace is ultimately accounted for in the balancing part  
12 of the process, but those factors will not absolutely preclude government regulation.”); *Jeffries II*,  
13 52 F.3d at 13 (“[T]he closer the employee’s speech reflects on matters of public concern, the  
14 greater must be the employer’s showing that the speech is likely to be disruptive before it may be  
15 punished.”). *But see Piscottano v. Murphy*, No. 3:04cv682, 2005 U.S. Dist. LEXIS 17140, at \*17  
16 (D. Conn. June 9, 2005) (“Nothing in either *Roe* or [*Treasury Union*] suggests that the Supreme  
17 Court in those cases had decided to categorically exempt ‘off-duty’ public employee expression  
18 from the public concern requirement of *Connick/Pickering*.”).

19 But we need not today decide and hence do not resolve whether it was necessary for the  
20 plaintiffs to satisfy the public concern test as a threshold matter. This is because, given our  
21 resolution of the *Pickering* balancing test, *infra*, we can assume *arguendo* that the plaintiffs’  
22 speech in this case did in fact relate to a matter of public concern. *See Melzer*, 336 F.3d at 196;

1 *Pappas v. Giuliani*, 290 F.3d 143, 146 (2d Cir. 2002). In this respect, we only note that, in order  
2 to find that the plaintiffs’ float participation did not involve speech on a matter of public concern,  
3 we would necessarily have to find clear error in the district court’s factual finding that one of the  
4 aims of the float was “to comment on the future racial integration of Broad Channel.” *Locurto*,  
5 269 F. Supp. 2d at 385. It goes without saying that such social commentary, if actually an aim of  
6 the float, would be “a subject of general interest and of value and concern to the public.” *Roel*,  
7 543 U.S. at 83-84; *see Rankin*, 483 U.S. at 387; *see also Connick*, 461 U.S. at 148 n.8 (describing  
8 racial discrimination as “a matter inherently of public concern”).

9 Assuming, therefore, that the plaintiffs were speaking on a matter of public concern, we  
10 proceed to the second part of the *Pickering* framework.

11  
12 B.  
13

14 It is undisputed in this case that the plaintiffs’ expressive activity was the motivating  
15 factor behind their dismissals. Accordingly, the burden is on the Government to make two  
16 showings: (1) that the employee’s activity was likely to interfere with Government operations  
17 and (2) that the Government acted in response to that likely interference and not in retaliation for  
18 the content of the speech. *See Jeffries II*, 52 F.3d at 13; *Heil v. Santoro*, 147 F.3d 103, 109 (2d  
19 Cir. 1998). If the Government carries its burden, a reviewing court then weighs the potential  
20 disruptiveness against the value of the speech to the plaintiff. *See Heil*, 147 F.3d at 109.

21 The district court held that the defendants did not, in fact, first suspend and then dismiss  
22 the plaintiffs in response to any reasonable concern for disruption of NYPD and FDNY  
23 operations but rather, and distinctly, “in response to the content of their speech and for reasons of

1 public perception and the political impact expected to flow therefrom.” *Locurto*, 269 F. Supp. 2d  
2 at 395; *see also id.* at 402 n.23. Several factual findings motivated the district court’s conclusion.  
3 Crucial to the district court’s analysis was its determination that Giuliani decided to dismiss the  
4 plaintiffs on or about September 10, 1998 — that is, before the identities of the individuals who  
5 participated in the float were known, before the administrative hearings were held, and without  
6 significant input from anyone within the City’s African-American community. *Id.* at 391-92.

7 We find no clear error in the district court’s holding that Giuliani made a decision on or  
8 about September 10, 1998 that, if the plaintiffs’ involvement in the float was as originally  
9 described, they would be fired. The trial record includes ample evidence to this effect. Giuliani  
10 was quoted in an article that ran on September 11, 1998 as saying that any City employee  
11 involved in the float would be fired. The next day, he was quoted as saying that, though the  
12 plaintiffs “technically” were suspended, they would never be reinstated unless he was ordered to  
13 do so by the United States Supreme Court. When he took the stand, Giuliani did not dispute that  
14 he made either of these statements. Tr. at 186, 189-90, 211. As the district court noted, Giuliani  
15 specifically testified that he was “not sure” whether a decision to fire the plaintiffs was made on  
16 September 10, 1998. Tr. at 224.

17 Giuliani argued on the stand that his statements could not be taken literally because the  
18 plaintiffs would have been reinstated had the hearing outcome been different, and that he did not,  
19 in any event, legally have the power to fire the plaintiffs. Tr. at 225. But clear error review  
20 sharply limits the extent to which we may second-guess the district court’s determinations with  
21 respect to witness credibility. *See, e.g., Phoenix Global Ventures LLC v. Phoenix Hotel Assocs.,*  
22 *Ltd.*, 422 F.3d 72, 76 (2d Cir. 2005) (per curiam) (“[C]lear error review mandates that we defer

1 to the district court’s factual findings, particularly those involving credibility determinations.”).

2 And, although Giuliani did not have the legal authority to fire the plaintiffs, he did have the

3 authority to fire Safir and Von Essen. Von Essen did not deny telling Steiner and Walters on

4 September 11, 1998 that he did not wish to fire them but that his “hands were tied.” Tr. at 366-

5 67. Given that Von Essen was empowered to accept or reject the recommendations of the ALJ, it

6 was not clearly erroneous for the district court to conclude that it was Giuliani who was tying his

7 hands. *See Locurto*, 269 F. Supp. 2d at 390 (“[I]t would stretch the limits of common sense to

8 conclude that these two (2) nominally independent Commissioners who served at the Mayor’s

9 pleasure would not have understood the consequences of their defiance of the Mayor on an issue

10 as to which he so strongly indicated his preference.”).

11 We disagree, however, with the district court’s legal conclusion, based largely on the

12 timing of the firing decision, that the dismissals were retaliatory or otherwise improper.<sup>6</sup> The

13 motive the district court attributed to the defendants encompasses, in effect, two different

14 rationales, which in the court’s view were both distinct from any putative concern over

15 disruption: (1) that Giuliani determined to fire the plaintiffs out of hostility toward the content of

16 their speech, and (2) that in firing the plaintiffs his motivating concern was his political image.

17 The court recited several bases for skepticism that the dismissals were motivated by

18 concern over disruption. First, Giuliani’s comments about firing “any police officer, firefighter,

19 or other city employee” came before he knew the identities of the float participants, and so

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1 <sup>6</sup> As we noted in *Locurto I*, although the defendants’ intent is a factual question, which

2 we review for clear error, whether that intent ultimately amounts to “retaliation” forbidden by the

3 Constitution is a question of law, which we review *de novo*. *See Locurto I*, 264 F.3d at 166, 167;

4 *see also Johnson v. Ganim*, 342 F.3d 105, 114-15 (2d Cir. 2003); *Gorman-Bakos v. Cornell*

5 *Coop. Extension*, 252 F.3d 545, 557-58 (2d Cir. 2001).

1 reflected an indifference to the particular job function that such employee might perform. The  
2 court said that the lack of any distinction between employees, such as police officers, whose jobs  
3 involved significant public contact, and those whose jobs did not involve such contact “undercuts  
4 the contention that his statements were motivated primarily by a concern for civil unrest and/or  
5 minority recruiting in the police and fire departments.” *Locurto*, 269 F. Supp. 2d at 391-92.  
6 Rather, the district court said, the true motivation for the plaintiffs’ termination was Giuliani’s  
7 negative feelings towards the content of the float, as evidenced by his terming the float a  
8 “disgusting display of racism.” *See id.* at 392.

9           Second, the district court noted that Giuliani admitted to having concerns over the  
10 public’s perception of his actions, reflected in his testimony that he “wanted people to know that  
11 . . . I agreed with their reaction, that this was a horrific incident and that these people had  
12 forfeited, in my view, their right to wear the uniform.” Tr. at 196. The district court found it  
13 conspicuous and relevant that these comments regarding the public’s perception came in the  
14 immediate aftermath of a highly public controversy over Giuliani’s handling of the Million  
15 Youth March. The district court did not find persuasive Giuliani’s denial that the Million Youth  
16 March had any role in his decision with respect to the float. In this respect, the court noted that  
17 Von Essen had written in his autobiography that Giuliani was “sensitive to the constant  
18 accusations of racism” made against him and the police. *Locurto*, 269 F. Supp. 2d at 392  
19 (quoting Thomas Von Essen, *Strong of Heart: Life and Death in the Fire Department of New*  
20 *York* 140 (2002)).

21           Third, the district court considered relevant the fact that the NYPD had not dismissed any  
22 officer for racially offensive speech or expression at least since 1991, opting instead for more

1 lenient penalties. The district court suggested that, were the defendants motivated by concern for  
2 “interdepartmental friction, diminished civilian confidence and future legal liability,” other  
3 officers involved in racist speech would have been punished more severely. *Id.* at 393.

4 Finally, the district court said that any avowed concern over disruption was undermined  
5 by Giuliani’s handling of the fatal shooting of unarmed African immigrant Amadou Diallo in  
6 February 1999. Despite widespread public condemnation of the officers involved in the Diallo  
7 shooting and attendant charges of racism hurled at the NYPD, Giuliani and Safir supported  
8 reinstatement of the officers. *Id.* at 394-95.

9 We have no doubt that, in considering how to respond to the plaintiffs’ actions, Giuliani,  
10 Safir, and Von Essen were driven largely by concerns over the public perception of the NYPD  
11 and FDNY. Where we part ways with the district court is in our recognition that the Government  
12 may, in some circumstances, legitimately regard as “disruptive” expressive activities that  
13 instantiate or perpetuate a widespread public perception of police officers and firefighters as  
14 racist.

15 Three of our circuit’s cases — *Jeffries II*, *Pappas*, and *Melzer* — give us particular  
16 guidance in reaching this conclusion. In *Jeffries II*, we upheld a jury verdict that permitted City  
17 College to reduce the term as department chair of a professor who made controversial public  
18 statements about Jews. We noted that prior precedents of our Court had established that the  
19 Government could not censure an employee for speaking on issues of public concern “unless the  
20 speech actually disrupted the employer’s operations.” *Jeffries*, 52 F.3d at 12 (citing *Jeffries v.*  
21 *Harleston*, 21 F.3d 1238, 1245 (2d Cir. 1994) (*Jeffries I*)). The *Jeffries II* Court acknowledged,  
22 however, that this holding was undermined by the Supreme Court’s decision in *Waters*, in which

1 a Court plurality emphasized that the Court has “given substantial weight to government  
2 employers’ *reasonable predictions of disruption*.” *Id.* at 13 (quoting *Waters*, 511 U.S. at 673).  
3 The *Jeffries II* panel explained that, under *Waters*, “the extent of the injury caused by the  
4 employee’s speech need not be actual; rather the government’s burden is just to show that the  
5 speech *threatened* to interfere with government operations.” *Id.* (emphasis added).

6 Given this language, the question in the case before us becomes one of defining a  
7 reasonable threat of disruption in the context of the jobs of police officers and firefighters. We  
8 considered this question in *Pappas*, in which we permitted the NYPD to dismiss an officer who  
9 worked on Department computers and who had anonymously replied to a series of mail  
10 solicitations from charities with racist and anti-semitic diatribes, and who, in the process, had  
11 generated media attention. Judge Leval’s majority opinion explained with characteristic elegance  
12 the unique relationship between a police department and the public it serves:

13 The effectiveness of a city’s police department depends importantly on the respect and  
14 trust of the community and on the perception in the community that it enforces the law  
15 fairly, even-handedly, and without bias. If the police department treats a segment of the  
16 population of any race, religion, gender, national origin, or sexual preference, etc., with  
17 contempt, so that the particular minority comes to regard the police as oppressor rather  
18 than protector, respect for law enforcement is eroded and the ability of the police to do its  
19 work in that community is impaired. Members of the minority will be less likely to report  
20 crimes, to offer testimony as witnesses, and to rely on the police for their protection.  
21 When the police make arrests in that community, its members are likely to assume that  
22 the arrests are a product of bias, rather than well-founded, protective law enforcement.  
23 And the department’s ability to recruit and train personnel from that community will be  
24 damaged.

25  
26 *Pappas*, 290 F.3d at 146-47 (internal citation omitted). Police officers and firefighters alike are  
27 quintessentially public servants. As such, part of their job is to safeguard the public’s opinion of  
28 them, particularly with regard to a community’s view of the respect that police officers and

1 firefighters accord the members of that community. Dissenting in *Pappas*, Judge Sotomayor  
2 emphasized that Pappas, an information systems employee, was unlike “[a] police officer  
3 walking the beat.” *Id.* at 156 (Sotomayor, *J.*, dissenting). Because someone who walks a beat “is  
4 often the representative with whom the public interacts[,] [i]t is not difficult to see how such an  
5 officer who expresses racist views in certain situations could damage the efficient operation of  
6 the NYPD.” *Id.*; see *McEvoy*, 124 F.3d at 103 (“The more the employee’s job requires  
7 confidentiality, policymaking, or *public contact*, the greater the state’s interest in firing her for  
8 expression that offends her employer.” (quoting Craig D. Singer, Comment, *Conduct and Belief:*  
9 *Public Employees’ First Amendment Rights to Free Expression and Political Association*, 59 U.  
10 Chi. L. Rev. 897, 901 (1992)) (emphasis added)); see also *Rankin*, 483 U.S. at 390-91.

11 More recently, in *Melzer*, we reiterated that a Government employer may, in termination  
12 decisions, take into account the public’s perception of employees whose jobs necessarily bring  
13 them into extensive public contact. In permitting the New York City Board of Education to  
14 dismiss Melzer for his professed pedophilia and involvement in NAMBLA, we considered  
15 “central to our review” the fact that Melzer was a school teacher, a position that “by its very  
16 nature requires a degree of public trust not found in many other positions of public employment.”  
17 *Melzer*, 336 F.3d at 198-99. Melzer argued that permitting the public’s reaction to his  
18 NAMBLA-related actions to influence the Board’s decision would amount to a “heckler’s veto,”  
19 see *id.* at 199, which the Supreme Court has long regarded as generally impermissible. See  
20 *Feiner v. New York*, 340 U.S. 315, 320 (1951) (“[T]he ordinary murmurings and objections of a  
21 hostile audience cannot be allowed to silence a speaker.”); *Terminiello v. City of Chicago*, 337  
22 U.S. 1, 4 (1949) (“[F]reedom of speech, though not absolute, is nevertheless protected against

1 censorship or punishment, unless shown likely to produce a clear and present danger of a serious  
2 substantive evil that rises far above public inconvenience, annoyance, or unrest.” (internal  
3 citation omitted)). The *Melzer* panel rejected the “heckler’s veto” argument as less applicable to  
4 the relationship between Melzer and high school parents, who were not “outsiders seeking to  
5 heckle Melzer into silence, [but] rather . . . participants in public education, without whose  
6 cooperation public education as a practical matter cannot function.” *Melzer*, 336 F.3d at 199; *cf.*  
7 *Tindle v. Caudell*, 56 F.3d 966, 971 (8th Cir. 1995) (“Because police departments function as  
8 paramilitary organizations charged with maintaining public safety and order, they are given more  
9 latitude in their decisions regarding discipline and personnel regulations than an ordinary  
10 government employer.”).

11 Our cases make clear, then, that the district court’s dichotomy between the defendants  
12 firing the plaintiffs “out of a concern for potential disruption” as against their doing so “for  
13 reasons of public perception” or “in response to the content of plaintiffs’ speech,” *Locurto*, 269  
14 F. Supp. 2d at 395, is a false one. Where a Government employee’s job quintessentially involves  
15 public contact, the Government may take into account the public’s perception of that employee’s  
16 expressive acts in determining whether those acts are disruptive to the Government’s operations.  
17 Moreover, as mentioned earlier, the disruption need not be actual; the Government may  
18 legitimately respond to a reasonable prediction of disruption.

19 All that said, it still must be the case, of course, that the concern for disruption, rather  
20 than some other, impermissible motive, was the actual reason for the adverse employment action.  
21 *See Sheppard v. Beerman*, 94 F.3d 823, 827 (2d Cir. 1996). And, even after demonstrating that a  
22 concern for disruption was its true motivation, the Government must also persuade a court that

1 its interest in preventing disruption outweighed the employee’s individual free speech interests.  
2 *See Jeffries II*, 52 F.3d at 13.

3 In the present case, the evidence in the record is overwhelming that, in discharging the  
4 plaintiffs, the defendants were motivated primarily by a concern that the public, and particularly  
5 members of minority communities, would regard the NYPD and FDNY as racist. This is, of  
6 course, a question of fact, and as a result, it is one in which we review the district court’s  
7 determination for clear error. *See Locurto I*, 264 F.3d at 167. Giuliani’s reported comments at the  
8 time the controversy initially surfaced are especially telling. In the context of the record as a  
9 whole, his statement that adverse actions would be taken against “any police officer, firefighter  
10 or other city employee,” see *Locurto*, 269 F. Supp. 2d at 391-92, cannot be read as suggesting  
11 that Giuliani was indifferent to whether the employee’s job involved public contact. Rather, as  
12 mentioned in the very article from which the quote derives, Giuliani knew at the time he made  
13 the statement that the suspected float participants were police officers and firefighters. Indeed,  
14 the quote itself indicated as much in its express reference to conversations Giuliani had with  
15 Safir and Von Essen. *See Mustain, supra*, at 7. Giuliani explained himself in contemporaneous  
16 remarks, saying that “[p]olice officers [and] firefighters carry a very heavy responsibility . . . to  
17 treat people fairly. That responsibility cannot be placed in doubt.” *Id.* (second and third  
18 alterations in original). The next day, he was quoted saying, “I’m not going to take the  
19 responsibility of keeping [Locurto] on the police force and then three years from now he hurts  
20 somebody and somebody wants to know why he wasn’t removed.” Roane, *supra*, at 51. Under  
21 the circumstances, the fact that, in a statement in which he specifically singled out police officers  
22 and firefighters, Giuliani tacked on “or other city employee” simply cannot bear the weight the

1 district court placed on it.

2 Moreover, the fact that Giuliani viewed the plaintiffs' speech as "a disgusting display of  
3 racism" does not, without more, mean he fired the plaintiffs in "retaliation" for engaging in racist  
4 speech. Indeed, if Giuliani's inclination were to fire City employees who engaged in racist  
5 speech, it would be difficult to explain why, as the plaintiffs themselves point out, the NYPD had  
6 never during Giuliani's tenure as mayor dismissed a police officer for this reason. *See Locurto*,  
7 269 F. Supp. 2d at 392-93. The district court recounted three incidents from the 1990s in which  
8 police officers used racial slurs in the course of their work but received relatively lenient  
9 penalties. *See id.* at 393 n.16. And the parties submitted to the district court a comprehensive  
10 breakdown of cases in which officers had been charged with racial misconduct. *See Joint Pre-*  
11 *Trial Exhibit*, Dec. 8, 2002. Notably, there is no indication in the record that any of these  
12 incidents generated nearly the notoriety of the plaintiffs' float, which was labeled "Racist Float"  
13 on the six o'clock news and which was covered extensively in the print media. The capacity for a  
14 particular incident to generate public attention is obviously highly relevant to the City's  
15 assessment of the incident's disruptive effects.<sup>7</sup> That is to say, the evidence is overwhelming that  
16 the *content* of racist speech did not bring about dismissal, in the absence of notoriety which  
17 would reasonably be seen to affect the perception of the speaker and the Government in the

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1 <sup>7</sup> And, although it is true that the Amadou Diallo controversy also generated notoriety and  
2 racial tension within the City, the similarity to this case ends there. Whatever one's opinion of  
3 the actions of the officers in the Diallo case, it was the position of the NYPD and the Mayor that  
4 the officers were acting within the scope of their duties, and it is undisputed that the officers were  
5 acquitted in court of any wrongdoing. *Locurto*, 269 F. Supp. 2d at 393-94. It is not inconsistent,  
6 under the circumstances, for Giuliani not to support dismissal of those officers. That is quite  
7 apart from the questionable relevance to *this case* of Giuliani's response to an incident that  
8 occurred months later.

1 public eye.

2           Giuliani’s trial testimony was wholly consonant with his being motivated by the  
3 plaintiffs’ actions bringing discredit upon the police and fire departments within minority  
4 communities. Giuliani said that he was concerned that the plaintiffs “had . . . acted in a highly-  
5 unprofessional way, in a way that would do great damage to the police department and the fire  
6 department, damage to the city, disrespect to the uniform, create disruption, and [have]  
7 consequences for other police officers and firefighters [and] put in question the ability of police  
8 officers and firefighters to act impartially with regard to minorities or people of different  
9 race[s].” Tr. at 179-80. He also expressed concern about the impact the float’s notoriety would  
10 have on minority recruiting, particularly within the FDNY. *See* Tr. at 180, 182-83.

11           The district court was, of course, free to place diminished weight on this testimony or  
12 even to disbelieve it outright, but its conclusion that Giuliani’s motive was impermissible must  
13 itself be supported by evidence in the record. *See* Fed. R. Civ. P. 52(a). Although Rule 52(a)  
14 demands great deference to a trial court’s factual findings in general, and to its credibility  
15 determinations in particular, we have not hesitated to find clear error “where the court has failed  
16 to synthesize the evidence in a manner that accounts for conflicting evidence or the gaps in a  
17 party’s evidentiary presentation.” *Doe v. Menefee*, 391 F.3d 147, 164 (2d Cir. 2004). Similarly,  
18 we have found clear error where, for example, “the trial court incorrectly assessed the probative  
19 value of various pieces of evidence, leading it to rely on speculation, and where the court failed  
20 to weigh all of the relevant evidence before making its factual findings.” *Id.* (citing *United States*  
21 *v. Rizzo*, 349 F.3d 94, 100-02 (2d Cir. 2003); *Ortega v. Duncan*, 333 F.3d 102, 107 (2d Cir.  
22 2003)).

1           We have already said that the district court’s discomfort with Giuliani’s worries over the  
2 general public perception of the float was misplaced. The only remaining, arguably  
3 impermissible, motive attributed to Giuliani was a concern over the “political impact” of the  
4 public reaction to the float. There are two distinct senses in which Giuliani’s motive could be  
5 described as “political.” First, he could have been concerned about the public perception of the  
6 police and fire departments and of the City. As mentioned, this concern is, in itself, an entirely  
7 legitimate one in the context of deliberate public acts by police officers and firefighters that are  
8 perceived as racist. Second, Giuliani could have been more specifically motivated by concerns  
9 over his personal popularity and/or his ability to continue to pursue his political agenda or win  
10 future elections. This would, of course, be an impermissible reason for dismissing the plaintiffs.  
11 But the only evidence in the record that, arguably, evinces this motive is the fact that Giuliani  
12 had recently been criticized over his handling of the Million Youth March. And that evidence is  
13 questionable, for Von Essen’s book, which the district court said “tied [the March controversy] to  
14 the decision-making process in this case,” *Locurto*, 269 F. Supp. 2d at 392, instead provides  
15 rather strong evidence that the “political impact” Giuliani sought to avoid was precisely the  
16 legitimate one to which he testified — the public perception that New York City police officers  
17 were racist.

18           In short, stripped of the analysis undermined by *Jeffries II*, *Pappas*, and *Melzer*, and in  
19 the light of substantial contrary evidence, the district court’s conclusion that Giuliani ordered the  
20 plaintiffs’ dismissals for improper motives rests on too thin a reed, one that “on the entire  
21 evidence” leaves us “with the definite and firm conviction that a mistake has been committed.”  
22 *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985) (quoting *United States v. U.S.*

1 *Gypsum Co.*, 333 U.S. 364, 395 (1948)). We find, instead, that the motive for the defendants’  
2 actions was a concern for the potential disruption the plaintiffs’ activities would cause to the  
3 NYPD and FDNY, in particular by engendering and perpetuating a public perception of those  
4 Departments as racially insensitive.

5           Moreover, we have no difficulty concluding, contrary to the district court, *see Locurto*,  
6 269 F. Supp. 2d at 396, that the defendants’ concern for disruption was reasonable at the time.  
7 The Supreme Court has said that “[w]hen close working relationships are essential to fulfilling  
8 public responsibilities, a wide degree of deference to the employer’s judgment is appropriate. . . .  
9 [W]e do not see the necessity for an employer to allow events to unfold to the extent that the  
10 disruption of the office and the destruction of working relationships is manifest before taking  
11 action.” *Connick*, 461 U.S. at 151-52; *see Arnett v. Kennedy*, 416 U.S. 134, 168 (1974) (Powell,  
12 *J.*, concurring) (“[T]he Government, as an employer, must have wide discretion and control over  
13 the management of its personnel and internal affairs. This includes the prerogative to remove  
14 employees whose conduct hinders efficient operation and to do so with dispatch.”). Whatever the  
15 plaintiffs’ intentions, the message their actions conveyed was, from the vantage of our nation’s  
16 history, sadly unoriginal. It was as obvious on September 10, 1998 as it was after the  
17 administrative hearings were held that police officers and firefighters who deliberately don  
18 “blackface,” parade through the streets in mocking stereotypes of African-Americans and, in one  
19 firefighter’s case, jokingly recreate a recent vicious hate crime against a black man, might well  
20 damage the relationship between the NYPD and FDNY and minority communities. *See, e.g.*,  
21 *Pappas*, 290 F.3d at 146-47; *Pappas*, 290 F.3d at 156 (Sotomayor, *J.*, dissenting); *Tindle*, 56  
22 F.3d at 973.



1 protection does not hinge on the palatability of the presentation; it extends to all speech on public  
2 matters, no matter how vulgar or misguided.”).

3 We nonetheless find that the defendants’ interest in maintaining a relationship of trust  
4 between the police and fire departments and the communities they serve outweighed the  
5 plaintiffs’ expressive interests in this case. If the NYPD and FDNY have any greater interests  
6 than these, they are few. *See Pappas*, 290 F.3d at 146-47. And the speech at issue in this case was  
7 not merely of passing interest to members of the African-American community; rather, they were  
8 the very objects of the plaintiffs’ derision. The First Amendment does not require a Government  
9 employer to sit idly by while its employees insult those they are hired to serve and protect. Under  
10 the circumstances, “an individual police officer’s [or firefighter’s] right to express his personal  
11 opinions must yield to the public good.” *Id.* at 147.<sup>8</sup>

### 12 Conclusion

13 We do not today endorse Justice Holmes’s widely discredited dictum that one has “a  
14 constitutional right to talk politics, but . . . has no constitutional right to be a policeman.”  
15 *McAuliffe v. Mayor & Bd. of Aldermen*, 29 N.E. 517, 517 (Mass. 1892). One does, of course,  
16 have a First Amendment right not to be terminated from public employment in retaliation for  
17 engaging in protected speech. But one’s right to be a police officer or firefighter who publicly  
18 ridicules those he is commissioned to protect and serve is far from absolute. Rather, it is  
19 tempered by the reasonable judgment of his employer as to the potential disruptive effects of the  
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1 <sup>8</sup> Because the *Pickering* balancing test weighs in favor of the defendants, we need not  
2 reach and do not decide whether the individual defendants would otherwise be entitled to  
3 qualified immunity.

1 employee's conduct on the public mission of the police and fire departments. We find, in this  
2 case, that the judgment of the defendants was reasonable, that it was the clear motive for the  
3 plaintiffs' dismissals, and that it outweighed the plaintiffs' individual First Amendment interests  
4 in participating in the "Black to the Future" float.

5           The judgment of the district court is therefore REVERSED and the case is REMANDED  
6 with instructions to enter judgment in favor of the defendants on the plaintiffs' federal claims.  
7 The state claims are dismissed without prejudice. Each party will bear its own costs.